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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. A-1009

HOUSING AUTHORITY OF THE CITY OF NEW HAVEN, POLLY MOORER, and JOSEPH R. PETERS,
Petitioners,

v.

DONALD T. DORSEY, COMMISSIONER OF THE DEPARTMENT OF COMMUNITY AFFAIRS OF THE STATE OF CONNECTICUT; ROBERT I. BERDON, TREASURER OF THE STATE OF CONNECTICUT; ADOLF G. CARLSON, COMMISSIONER OF FINANCE AND CONTROL OF THE STATE OF CONNECTICUT; NATHAN G. AGOSTINELLI, COMPTROLLER OF THE STATE OF CONNECTICUT; and BARTHOLOMEW GUIDA, MAYOR OF THE CITY OF NEW HAVEN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

DONALD E. COBEY
CHARLES W. DIBBELL
RONALD J. FRACASSE
205 Church Street
New Haven, Connecticut 06506
Counsel for Petitioners

June 11, 1973

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioners, Housing Authority of the City of New Haven, Polly Moorer and Joseph R. Peters, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on January 18, 1973.

Opinions Below

The opinion of the Connecticut Supreme Court, which is not yet reported in the official Connecticut Reports or in the unofficial Atlantic Reports, appears in Appendix A hereto, *infra*, pp. 2a-8a, as printed in the January 30, 1973 issue of the *Connecticut Law Journal*, 34 Conn. L. J., No. 31, p. 1. The judgment entered by such court also appears in Appendix A, *infra*, pp. 1a-2a. The opinion of the Superior Court of the State of Connecticut, which is unreported, appears in Appendix B hereto, together with the judgment entered by such court, *infra*, pp. 1b-9b.

Jurisdiction

The judgment of the Connecticut Supreme Court was entered on January 18, 1973. An order of Mr. Justice Thurgood Marshall was signed on April 3, 1973 extending the time for filing a petition for writ of certiorari in this matter to and including June 15, 1973.

This Court's jurisdiction is invoked under 28 U. S. C. § 1257(3).

Questions Presented

1. Whether 42 U.S.C. § 1401 mandates that no tenant of a Federally subsidized public housing authority shall be barred, solely because of such tenancy, from serving as a commissioner of the housing authority of which he is a tenant, so that, under the principles of Federal supremacy set forth in Article VI, clause 2 of the United States Constitution, such statute is controlling over any Connecticut statutory or common law to the contrary as determined by the Connecticut Supreme Court.

2. **Whether Section 8-42, Connecticut General Statutes, as it has been construed and applied to tenants of a Connecticut local housing authority by the Connecticut Supreme Court so as to bar a tenant of a Federally subsidized public housing authority from being a commissioner of that authority solely because of such tenancy, is repugnant to the Constitution or laws of the United States.**

3. Whether the judgment of the Connecticut Supreme Court, which bars a tenant of a Federally subsidized public housing authority from being a commissioner of that authority in Connecticut solely because of such tenancy, violates the rights, privileges and immunities of the individual petitioners and of the corporate petitioner under the Equal Protection Clause, the Privileges and Immunities Clause and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and under the United States Housing Act of 1937, as amended (42 U.S.C. § 1401 *et seq.*).

Constitutional and Statutory Provisions Involved

A. Constitutional provisions:

This petition involves the Fourteenth Amendment to the Constitution of the United States and the Supremacy Clause (Article VI, Clause 2) of the Constitution, which are set out in Appendix E, *infra,* p. 1e.

B. Statutory provisions:

1. United States Code, Title 42:

§ 1401. *Declaration of Policy*

It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to alleviate present and recurring

unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income, in urban, rural nonfarm, and Indian areas, that are injurious to the health, safety, and morals of the citizens of the Nation. In the development of low-rent housing it shall be the policy of the United States to make adequate provision for larger families and for families consisting of elderly persons. It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this chapter while effecting economies. *It is the sense of the Congress that no person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a low-rent housing project.* [Emphasis added]

§ 1402. *Definitions*

(1) The term "low-rent housing" means decent, safe and sanitary dwellings within the financial reach of families of low income, and developed and administered to promote serviceability, efficiency, economy, and stability, and embraces all necessary appurtenances thereto. The dwellings in low-rent housing shall be available solely for families of low income. . . .

(2) The term "families of low income" means families (including elderly and displaced families) who are in the lowest income group and who cannot afford to pay enough to cause private enterprise in their locality or metropolitan area to build an adequate supply of decent, safe, and sanitary dwellings for their use. . . .

(11) The term "public housing agency" means any State, county, municipality, or other governmental entity or public body (excluding the Authority), which is authorized to engage in the development or administration of low-rent housing or slum clearance. . . .

(13) The term "Authority" means the United States Housing Authority created by section 1403 of this title.

§ 1403. *United States Housing Authority*

There is hereby created in the Department of Housing and Urban Development the United States Housing Authority, which shall be an agency and instrumentality of the United States. The functions, powers, and duties of the Authority are vested in and shall be exercised by the Secretary of Housing and Urban Development. . . .

§ 1410. *Annual contributions in assistance of low rentals—Authorization*

(a) The Authority may make annual contributions to public housing agencies to assist in achieving and maintaining the low-rent character of their housing projects. The annual contributions for any such project shall be fixed in uniform amounts, and shall be paid in such amounts over a fixed period of years. The Authority shall embody the provisions for such annual contributions in a contract guaranteeing their payment over such fixed period: . . . *Provided, further,* That the Authority is authorized to amend or supersede annual contributions contracts to provide payments annually (within the limits prescribed by this chapter) which the Authority determines are required (1) to assure the low-rent character of the projects involved, and (2) to achieve and maintain adequate operating and maintenance services and reserve funds including payment of outstanding debts.

2. Connecticut General Statutes:

§ 8-41. *Appointment, Qualifications and Tenure of Commissioners*

When the governing body of a municipality other than a town adopts a resolution as described in section 8-40, it shall promptly notify the chief executive officer of such adoption. Upon receiving such notice, the chief executive officer shall appoint five persons who are residents of said municipality as commissioners of the authority. If the governing body of a town adopts such a resolution, such body shall appoint five persons who are residents of said town as commissioners of the authority created for such town. The commissioners who are first so appointed shall be designated to serve for one, two, three, four and five years, respectively, from the first day of the month next succeeding the date of their appointment and annually thereafter a commissioner shall be appointed to serve for five years except that any vacancy which may occur because of a change of residence by a commissioner, removal of a commissioner, resignation or death shall be filled for the unexpired portion of the term. No commissioner of an authority may hold any public office in the municipality for which the authority is created. A commissioner shall hold office until his successor is appointed and has qualified. A certificate of the appointment or reappointment of any commissioner shall be filed with the clerk and shall be conclusive evidence of the legal appointment of such commissioner, after he has taken an oath in the form prescribed in the first paragraph of section 1-25. The powers of each authority shall be vested in the commissioners thereof. Three commissioners shall constitute a quorum. Action may be taken by the authority upon a vote of not less than a majority of the commissioners present, unless the bylaws of the authority require a larger number. The chief execu-

tive officer, or, in the case of an authority for a town, the governing body of the town, shall designate which of the commissioners shall be the first chairman, but when the office of chairman of the authority becomes vacant, the authority shall select a chairman from among its commissioners. An authority shall select from among its commissioners a vice chairman, and it may employ a secretary, who shall be executive director, and technical experts and such other officers, agents and employees, permanent and temporary, as it requires, and shall determine their qualifications, duties and compensation, provided, in municipalities having a civil service law, all appointments and promotions, except the employment of the secretary, shall be based on examinations given and lists prepared under such law, and, except so far as may be inconsistent with the terms of this chapter, such civil service law and regulations adopted thereunder shall apply to such housing authority and its personnel. For such legal services as it requires, an authority may employ its own counsel and legal staff. An authority may delegate any of its powers and duties to one or more of its agents or employees. A commissioner, or any employee of the authority who handles its funds, shall be required to furnish an adequate bond. The commissioners shall serve without compensation, but shall be entitled to reimbursement for their actual and necessary expenses incurred in the performance of their official duties.

§ 8-42. *Commissioners and Employees to Have No Interest in Project*

No commissioner or employee of an authority shall acquire any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project. If any commissioner or employee of an authority owns or controls an interest, direct or indirect, in any property included, or planned to be

included in any housing project, he shall immediately disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure so to disclose such interest shall constitute misconduct in office.

§ 8-56. *Aid from Federal Government*

In addition to the powers conferred upon an authority by other provisions of this chapter, an authority is empowered to borrow money or accept grants or other financial assistance from the federal government for or in aid of any housing project within its area of operation and to take over or lease or manage any housing project or undertaking constructed or owned by the federal government, and to comply with such conditions and enter into such mortgages, trust indentures, leases or agreements as may be necessary or desirable therefor. It is the purpose and intent of this chapter to authorize every authority to do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the undertaking, construction, maintenance or operation of any housing project by such authority.

Statement of the Case

The petitioners are Housing Authority of the City of New Haven (herein called "the Housing Authority" or "the corporate petitioner") and Polly Moorer and Joseph R. Peters. Said Polly Moorer and Joseph R. Peters are sometimes herein called "the individual petitioners."

The individual petitioners are tenants of the Housing Authority (R. p. 32.)[1] At the time of the commencement

1. References herein to the Record are to the PRINTED RECORD in the court below. References to the PRINTED RECORD are to said record below.

of the action below they were also commisioners of the Housing Authority, having been appointed by the Mayor of the City of New Haven (R. pp. 22, 23, 32), who, under the provisions of the relevant Connecticut statutes [Connecticut General Statutes, Sec. 8-41] had and has the power and duty to appoint commissioners of the Housing Authority.

The corporate petitioner is a local housing authority organized under the laws of the State of Connecticut to carry out the purposes and functions of a local public housing agency under the United States Housing Act of 1937, as amended (42 U.S.C. §§1401 *et seq.*), which act contains provisions to assist low rent housing throughout the country. It was duly and validly created in 1938 pursuant to the provisions of Chapter 33c of the 1937 Supplement of the General Statutes of Connecticut, which chapter, as amended, is now contained in Chapter 128 of the Connecticut General Statutes (R. p. 22). The number of commissioners who are, under Sec. 8-41 of the Connecticut General Statutes, to be appointed for the Housing Authority is five. At the time of the institution of this action the five commissioners appointed by the Mayor of the City of New Haven were Joseph A. Fleischner, Dominic Panagrossi, Carmen Aitro, each of whom is a non-tenant, and petitioners Polly Moorer and Joseph R. Peters, each of whom was at the time of appointment and is now a tenant of the Housing Authority (R. pp. 22, 23, 31, 32).

The Housing Authority and the United States of America have entered into annual contributions contracts whereby the Federal government furnishes financial and other assistance to the Housing Authority for the construction, financing and operation of the Housing Authority's low rental housing projects and other activities of the Author-

ity in accordance with the provisions of the United States Housing Act of 1937, as amended, and other provisions of the laws of the United States and the State of Connecticut (R. p. 25). Pursuant to such financial assistance the Authority has constructed or financed and operates more than 2,800 low rent units of various kinds including elderly units, leased housing units and low rent family units. There are approximately 9,000 people living in said low rent units of the Housing Authority (R. p. 29).

The Housing Authority and the State of Connecticut, acting through various agencies, have entered into various agreements whereby the State furnishes financial and other assistance to the Housing Authority for the construction, financing and operation of the Housing Authority's moderate rental housing projects and for financing and operating other activities and services performed and furnished by the Housing Authority in accordance with the applicable provisions of the statutes of the State of Connecticut [Connecticut General Statutes, §§ 8-38, et seq.] (R. p. 25). Pursuant to such assistance the Housing Authority has constructed and operates approximately 742 moderate rental units which provide housing for approximately 3,000 people (R. p. 29).

On April 12, 1971, at a time when the individual petitioners were serving as commissioners of the Housing Authority, the Attorney General of the State of Connecticut issued his written opinion to the Department of Community Affairs of the State of Connecticut (herein sometimes called "DCA"), advising that "a tenant of a housing authority established under Chapter 128 Gen. Stat. can[not] be appointed and serve as a housing authority commissioner within that same housing authority." The Attorney Gen-

eral concluded that the interest of a housing authority commissioner who is a tenant would raise a conflict of interest in all areas of the commissioners' functions, and this was the basis of his opinion.

As a result of such opinion, respondent DCA Commissioner Donald T. Dorsey stated that he would not accept applications from the Housing Authority nor enter into future contracts with it while members of its board of commissioners were also tenants of the Housing Authority. Respondent DCA commissioner expressly based his statement and his actions on such written opinion of the Attorney General (R. p. 28).

Accordingly, on May 6, 1971, petitioners instituted this action in the Superior Court of Connecticut (a) for a declaratory judgment determining, *inter alia,* whether the individual petitioners were validly appointed as commissioners of the petitioner Housing Authority with the full and unrestricted powers of that office, and whether any tenant of the Housing Authority or of any other Connecticut housing authority may be a commissioner of that housing authority, and (b) for certain injunctive relief (R. pp. 8, 9).

The Connecticut Superior Court, by its judgment filed November 17, 1971, adjudged that the individual petitioners did not qualify as commissioners of the Housing Authority and that a tenant of the Housing Authority or of any other housing authority in Connecticut may not be a commissioner of that housing authority, because such commissioners are barred from being commissioners under said Section 8-42 of the Connecticut General Statutes (App. p. 3b).

In August 1971, while the aforesaid action was pending, the term of petitioner Joseph R. Peters as commissioner

expired. A nontenant successor was appointed in his place in December 1971, after said judgment of the Superior Court had been entered. Petitioner Polly Moorer resigned as a commissioner in December 1971, and the vacancy created by her resignation has not yet been filled (R. pp. 22, 23).

On appeal the Connecticut Supreme Court, by its judgment dated and entered January 18, 1973, affirmed the judgment of the Superior Court, and on the same day issued its opinion that a tenant is not qualified to be a housing authority commissioner, because of his tenancy, basing its decision in part on Section 8-42 of the Connecticut General Statutes and in part on the Connecticut common law (App. pp. 2a-8a).

Both Connecticut courts denied petitioners' claims that (a) said Section 8-42 of the Connecticut General Statutes, if construed and applied to disqualify the individual petitioners or tenants of other Connecticut housing authorities, solely because of their tenancy, from being commissioners of the housing authorities of which they are tenants, is unconstitutional as so construed and applied; (b) that said 42 U.S.C. § 1401 requires that a tenant of a "local housing agency" shall not be barred from serving as a commissioner of the housing authority of which he is a tenant, solely because of such tenancy, and that the constitutional doctrine of Federal supremacy requires the courts of Connecticut to apply said Federal statute as so construed, to the present case and to grant such Federal statute precedence over any Connecticut statute or rule of common law to the contrary; and (c) that if a tenant of a Connecticut housing authority is, solely because of his tenancy, forbidden by Connecticut law, whether by statute or by common law, to act as a commissioner, this constitutes a violation of the privileges and

immunities, the due process, and the equal protection clauses of the Fourteenth Amendment of the United States Constitution, both as to the individual petitioners and as to the Housing Authority.

The Federal Questions Sought to be Reviewed Were Raised in Each Proceeding Below and Decided Adversely to Petitioners.

Petitioners seek to review the judgment of the Supreme Court of the State of Connecticut. The Federal questions which are sought to be reviewed by this Court were raised in the complaint, in the trial stage, and in the appellate stage, before the Superior and Supreme Courts of the State of Connecticut.

The complaint which was issued in instituting the suit set forth the Federal questions. By its answer defendants put in issue petitioners' claims with respect to these Federal questions. In substance paragraph 29 of petitioners' original complaint, which appears on page 7 of the PRINTED RECORD of the lower court, sets forth the claim of petitioners that the individual plaintiffs were duly appointed and qualified and acting as commissioners of the Housing Authority, that the individual plaintiffs have the same right under the Constitution and laws of the United States and of the State of Connecticut to be commissioners of the housing authority in which they are tenants as any other eligible persons who are not tenants, and that the Housing Authority itself has the same right as any other housing authority, none of whose commissioners is a tenant of such authority, under the Constitution and laws of the United States and of the State of Connecticut, to generally conduct its business and to perform its duties and activities as set forth under the laws of the United States and the State of

Connecticut. Petitioners' prayer for relief contained in said complaint as set forth at pages 8 and 9 of said PRINTED RECORD, in addition to requesting a permanent injunction against the various defendants and such other relief in equity as may appertain, also requested the following relief:

> "1. A declaratory judgment determining whether or not:
>
> (a) the plaintiffs Polly Moorer and Joseph R. Peters, being tenants of plaintiff Housing Authority, are validly appointed and duly qualified commissioners of said Housing Authority, with the full and unrestricted rights and powers of that office;
>
> (b) a tenant of the plaintiff Housing Authority may be a commissioner of the Housing Authority, with the full and unrestricted rights and powers of that office, if duly appointed by the appointing authority;
>
> (c) a tenant of a housing authority in Connecticut may be a commissioner of that housing authority, with the full and unrestricted rights and powers of that office, if duly appointed by the appointing authority."

During the trial before the Superior Court of the State of Connecticut the Federal questions sought to be reviewed by this Court were raised in oral argument and through petitioners' claims of law made in their "Memorandum of Plaintiffs in Support of Eligibility of Plaintiffs Moorer and Peters and Other Tenants of Connecticut Housing Authorities to be Appointed and to Act as Commissioners of Such Authorities" which was filed with the trial court after oral presentation. At page 3 of said memorandum petitioners made the following claim:

> ". . . The plaintiffs further submit that, by virtue of applicable Federal housing statutes and

> action taken and contracts entered into thereunder, the constitutional doctrine of Federal supremacy requires that the Connecticut law must in any event bow to the provisions of Federal law which require that tenants shall be eligible to serve as commissioners of housing authorities which are financially assisted by the Federal government, as is the plaintiff Authority. The plaintiffs also contend that constitutional provisions and principles require that tenants may not be discriminated against and treated differently from other persons in respect of their eligibility to be appointed and serve as commissioners of public housing authorities."

Then again at pages 22 and 23 of said Memorandum, petitioners made the following claims with respect to Federal supremacy and the privileges and immunities and the equal protection clauses of the Fourteenth Amendment to the United States Constitution:

> "Since the operations of the plaintiff Housing Authority are dependent upon subsidies from the Federal Government, and since the general policy considerations which control the operation of low-income housing facilities are laid down by the Federal Government, it is submitted that, when the Congress has spoken with respect to tenant housing commissioners as it has in the Housing and Urban Development Act of 1970, and when HUD has spoken as it has in its aforesaid Circular, this must be accepted as an adjudgment by the Federal Government that in low-income housing projects, they can be best operated by not discriminating against and closing the door to tenant commissioners if the appointing official deems a tenant to be the best qualified person to be appointed as commissioner at the time, and that this determination by the Federal

Government supersedes and overrides any determination of the states to the contrary.

• • •

The Fourteenth Amendment provides that no state shall 'make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.'

A housing commissioner, serving without pay, is performing a public service which should be encouraged and he should not be prevented from acting by an unconstitutional discriminatory bias. It is submitted that these provisions of the Fourteenth Amendment forbid a state to deny a housing authority tenant, who is otherwise well qualified to be a commissioner of the authority, the privilege of being eligible for such post. There is no constitutional basis for making a distinction between tenants and nontenants in their eligibility to be housing authority commissioners. This 'creates a classification which constitutes an invidious discrimination denying' the tenants 'the equal protection of the laws.' See *Shapiro* v. *Thompson,* 394 U.S. 618, 627 (1969), which held that the one-year residence requirement of the Connecticut statutes for welfare recipients was unconstitutional. In that case the Supreme Court refused to accept the alleged money savings to the State as a sufficiently 'compelling' reason to depart from constitutional requirements of equality. To the extent that Sec. 8-42 of the General Statutes may be construed to have this effect, it is unconstitutional as so construed.

The growing increase in the number of public housing tenants creates a large and ever-increasing number of persons in the State and in the country who will become second-class citizens if they are denied the privilege of acting as housing authority commissioners and performing the public duties of such commissioners."

In its Memorandum of Decision the trial court rejected these claims of petitioners. That court stated (App. p. 5b:)

> **"The plaintiffs claim that the individual plaintiffs Moorer and Peters were eligible, under Connecticut law, to be appointed as commissioners of the plaintiff Authority and, having been duly appointed by the authorized appointing official—the Mayor of the City of New Haven—are legally qualified to act as such commissioners in all respects, with the same powers and rights as commissioners who are not tenants of such Authority. The plaintiffs further claim that, by virtue of applicable Federal housing statutes and action taken and contracts entered into thereunder, the constitutional doctrine of Federal supremacy requires that the Connecticut law must in any event bow to Federal provisions which they claim provide that tenants shall be eligible to serve as commissioners of housing authorities which are financially assisted by the Federal government, as is the plaintiff Authority. The plaintiffs also contend that constitutional provisions and principles require that tenants may not be discriminated against and treated differently from other persons in respect of their eligibility to be appointed and serve as commissioners of public housing authorities."**

And then again the court stated in said Memorandum of Decision (App. p. 8b):

> "The remaining claims of the plaintiffs require little consideration. The reading of Plaintiffs' Exhibits A (HUD Circular 7401.1 dated 7/14/70), B (HUD Circular dated 1/28/71 (which supplements Exhibit A)) and C (42 USCA § 1401.1 as amended December 31, 1970, Pub. L. 91-609) demonstrates that the federal government is not opposed to having tenants serve as commissioners and in fact encourages such service. These exhibits also make

> clear the fact that state law and local policy control and that the federal government clearly recognizes this fact. The inescapable conclusion is that the language is precatory and does not command. As a constitutional matter equal protection does not require a person to be treated in the same manner as persons in another classification."

The trial court denied all claims for injunctive relief and entered the following declaratory judgment (App. p. 3b):

> "(1) The plaintiffs Polly Moorer and Joseph R. Peters, by reason of being tenants of the plaintiff Housing Authority, have acquired a direct or indirect interest therein and do not qualify as commissioners of said Housing Authority under Section 8-42 of the General Statutes.
>
> (2) Even if duly appointed by the appointing authority, a tenant of the plantiff Housing Authority under Section 8-42 of the General Statutes may not be a commissioner of the Authority.
>
> (3) Even if duly appointed by the appointing authority a tenant of a Housing Authority in Connecticut may not be a commissioner of that housing authority with the full and unrestricted rights and powers of that office by virtue of the disqualification provisions of Section 8-42 of the General Statutes."

On appeal, petitioners raised the Federal questions sought to be reviewed by this Court through the assignments of error, their appellate brief and oral argument before the Supreme Court of Connecticut. At pages 35 through 38, inclusive, of the PRINTED RECORD, the trial court, in its finding, found at paragraphs 95 through 109, inclusive, thereof that the petitioners made the claims of law herein sought to be reviewed, each of which the court denied (App. p. 3d). Petitioners in their assignments of

error, which appear at pages 38 and 39 of the PRINTED RECORD at paragraph 5 thereof, claimed that the court erred in overruling the claims of law set forth in said paragraphs 95 through 109, inclusive, of the finding. In spite of said assignments of error the court below made no corrections to the finding. PRINTED RECORD, p. 39.

In oral arguments before the Supreme Court of Connecticut petitioners raised the Federal questions and these questions are set forth in petitioners' appellate brief. In that brief petitioners claim that the Federal law requires that tenants shall be eligible to be commissioners. BRIEF OF PLAINTIFFS, pp. 9, 10, 11, 12 and 13. At pages 23 through 29 of said brief, petitioners set forth their arguments that Federal law requires that tenancy in a public housing authority shall not disqualify a person from being commissioner and that the doctrine of Federal supremacy is applicable and further that the privileges and immunities, the due process and the equal protection clauses of the Fourteenth Amendment to the United States Constitution forbid tenancy in a public housing authority from disqualifying a person from being a commissioner. These claims of petitioners relating to the Federal questions sought to be reviewed in this court were rejected by the Supreme Court of Connecticut as set forth in its opinion and decision (App. p. 2a).

Reasons for Granting the Writ

I

This is the First Case in this Court Involving Eligibility of a Tenant to Hold the Office of Housing Authority Commissioner.

This is the first case in this Court involving the deprivation by a state of the right and privilege of a tenant of a public housing authority to be a commissioner of that authority and the right of such authority to have the benefit of tenant participation in its direct management. It ought

to be determined now by this Court, as a matter of uniform national application, whether this is a deprivation of a Federal statutory and constitutional right and privilege of the large numbers of such tenants and housing authorities throughout the country.

An examination of the statutes of all fifty states shows that local housing authorities are authorized in each state. The standard pattern of the legislation is to provide for the appointment of commissioners and to forbid self interest of the commissioners in property included in the project or in contracts with the authority. Most of the legislation on these matters is worded like Sections 8-41 and 8-42 of the Connecticut General Statutes. State legislation creating local housing authorities was related to and was adopted as a part of the Federal low-rent housing program. Ebenstein, *The Law of Public Housing,* 23 Minn. L. Rev. 878 (1939).

Statutes of forty-five states, including those of Connecticut, are silent as to whether tenants may be commissioners. Five of the state statutes have provisions regarding tenant commissioners: California, 41A Cal. Code, Secs. 34270, 34281 (full unqualified authorization); Massachusetts, Ann. Laws of Mass., Ch. 121, Sec. 26L (flat prohibition); Michigan, Mich. Comp. L. Ann., Sec. 125.654 (authorization of limited number); New York, Public Housing Law (44A Consol. Laws) Sec. 30 (authorization of not more than one member); Rhode Island, Gen. L. of R.I., Secs. 45-25-10, 45-25-13 (3 of the 11 commissioners of the Providence housing authority "shall be occupants of public housing").

Attorney Generals in five states, where the statutes were at the time silent as to tenant commissioners, have given their opinions that housing authority tenants who were

already tenants were eligible to be appointed as commissioners of the authority where they reside: California, OAG No. 67-166, April 4, 1968; Kentucky, OAG No. 70-135, February 24, 1970 (unpublished); Maine, OAG dated April 25, 1973 (unpublished); New York, Informal opinion dated May 18, 1967; Ohio, OAG No. 71-057, September 22, 1971. No state Attorney General in a state other than Connecticut appears to have given an opinion that a then resident tenant of a housing authority is ineligible to be appointed as a commissioner of that authority.

As shown in the Statement of the Case, the petitioner Housing Authority operates, in New Haven, more than 2,800 low rent units of various kinds including elderly units, leased housing units, and low rent family units; there are approximately 9,000 people living in such units. In addition, the petitioner Housing Authority operates 742 moderate rental units with approximately 3,000 individuals living therein.

There is no evidence in the Record as to the numbers of housing authorities operating federally subsidized low rent housing units elsewhere in Connecticut or in the other states. However, petitioners respectfully request that this Court take judicial notice of the fact that there are large numbers of low rent Federally subsidized housing authorities operating in the United States at the present time, and that the aggregate numbers of tenants residing in housing units operated by such authorities is large. Furthermore, there is included as Appendix C a letter dated May 23, 1973 from the National Association of Housing and Redevelopment Officials to one of the counsel for petitioners, stating that the total number of housing units operated in the fifty states as of June 30, 1972 by approximately 2,460 local housing authorities was 1,019,481, which housed approximately 3.3 million persons (App. pp. 1c-2c). The basis for such letter was stated to be "Appropriation testimony"

given by the Secretary of HUD in May, 1973. More exact citation to such testimony is not available at this time.

II

A ruling by this court as to the federal mandate stated in 42 U.S.C. §1401 is necessary.

It is vital for the courts of all states, in passing upon their own state laws with the respect to the appointment of tenant commissioners, to have a determination by this Court as to the correct construction and application of 42 U.S.C. § 1401. The Connecticut Supreme Court, in its decision as to the interpretation, effect and validity of that section, as applied by that court, has decided this federal question of substance which has not heretofore been determined by this Court.

The following sentence was added to Section 1 of the United States Housing Act of 1937, as amended (42 U.S.C. § 1401, which is the basic policy statement of such Act) by Public Law 91-609 of the Laws of the 91st Congress, Second Session, approved December 31, 1970, 84 Stat. 1779:

> "It is the sense of the Congress that no person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a low-rent housing project."

Petitioners have contended in the Connecticut courts that this is a Federal mandate that a tenant of a Federally subsidized local housing authority shall not be ineligible, solely because of his status as tenant, to be appointed as a commissioner of the authority of which he is a tenant, and that the constitutional doctrine of Federal Supremacy requires that this Federal statute shall have precedence over any state statute or state rule of common law to the contrary.

The Connecticut courts have rejected this construction and application of this sentence of 42 U.S.C. § 1401. They have held, on the contrary, that, in spite of this sentence, the law of Connecticut may and does ban a tenant, solely because of such tenancy, from being eligible to be a commissioner.

In fact, however, such a construction and application as that made by the courts below, would seem to require a determination that Congress, in adding the final sentence of 42 U.S.C. §1401, had labored and brought forth nothing. It indeed seems unlikely that Congress would go through the immense mechanics of adopting amendatory legislation only to have such legislation say, in a merely precatory way, "We think it would be nice if tenants were to become local housing agency commissioners, but it's just a thought for the states to consider." Rather, good sense and good statutory construction require that the sentence have a substantive effect, viz. to declare a Congressional policy that tenants shall be eligible to be commissioners. This requires that the word "should", in that final sentence of §1401, be given the meaning of "shall". See also the discussion under III, *infra.*

There is substantial authority to read the word "should" as "shall". The second meaning of "should" in Merriam-Webster's Dictionary, 3d Ed. (1964), p. 2104, is:

> "2.—used in auxiliary function to express duty, obligation, necessity, propriety or expediency (for 'tis commanded I should do so—Shak.) . . . (the law was then passed . . . that every senator should take an oath—J. A. Froude) (in such cases the officer should first give notice to those in the house—Paul Wilson)"

Similarly, Canon 5 of the Lawyers' Code of Professional Responsibility specifies that "A lawyer should exercise independent professional responsibility on behalf of a client," which seems clearly to impose a mandatory responsibility.

Statutory use of "should" was held to be mandatory in *Fegan* v. *Lykes Bros.*, 198 La. 312, 3 So. 2d 632, and in *Town of Edgewater* v. *Liebhardt*, 32 Colo. 307, 76 P. 366.

One of the objectives of the Federal low-rent housing program, as stated in the last sentence of 42 U.S.C. §1401, is to permit tenants to participate in local management as commissioners. Thus, "Congress has occupied the field, . . . [and] the dominant interest of the Federal government precludes state intervention . . . with the operation of the federal plan . . ." *Pennsylvania* v. *Nelson*, 350 U.S. 497, 509 (1956).

In any event, irrespective of the final decision of this Court, the Court should assume jurisdiction of the matter in order to make a ruling that will be authoritative throughout the country as a final determination of the effect and application of the Congressional statement of policy as to tenant commissioners contained in 42 U.S.C. § 1401.

III

This court should decide whether there shall be a uniform standard of eligibility of tenants to be commissioners of federally subsidized housing authorities under 42 U.S.C. §1401, or whether varying standards may be prescribed by the states.

Housing authority tenants and local housing authorities throughout the country are entitled to know whether a state, constitutionally, (a) may deprive such tenants of all right to be commissioners of the authorities whose tenants they are, or (b) may not, solely because of such tenancy, deprive them of such right, or (c) may impose certain restrictions and limitations on their right to be commissioners; so that they and others interested in their welfare can endeavor to secure remedies by appropriate legislation.

A decision on the issues raised is necessary for future guidance. Until this Court has accepted for review and has decided the question as to whether a tenant has either an absolutely protected Federal right (whether by virtue of 42 U.S.C. § 1401 or by the provisions of the Fourteenth Amendment) not to be barred, solely because of such tenancy, from being a commissioner, or has no such right, or has a right which is not absolute but can be subjected to certain limitations, the tenants and housing authorities and other interested persons in the various states will not be in a proper position to propose or support such legislation as is appropriate in the light of the decision of this Court.

This Court should assume jurisdiction in order to provide guidelines for the scope of such legislation, e.g. whether a state may impose some restrictions but not others on housing authority tenants as commissioners. This Court has recently provided such guides in its abortion decisions by setting some areas in which prohibitory state legislation is absolutely proscribed, some areas in which regulatory legislation is permitted, and some areas in which prohibitory legislation is permitted. *Roe* v. *Wade*,—U.S.—, 35 L. Ed. 2d 147 (1973).

This case presents a new example of deprivation of civil rights by arbitrarily creating a class of persons who are to be deprived of rights shared by all other persons. The lower courts have decreed that a tenant of a housing authority can not be a commissioner of that housing authority because of his status as a tenant.

The individual petitioners and other tenants of public housing authorities have "the right to be considered" for the office of housing commissioner "without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate

federal constitutional guarantees." *Turner* v. *Fouche*, 396 U.S. 346, 362-363 (1970).

This Court should consider and determine whether such a deprivation of rights ought to be upheld for the narrow reasons of alleged conflict of interests enunciated by the court below or whether larger interests of the individual tenants involved should be given pre-eminence. Congress has itself determined that tenancy in a federally assisted local housing agency does not constitute such a conflict of interest as to disqualify a person for that reason alone from being a commissioner of that housing agency. This determination by Congress has unquestionably been made, whether or not the word "should" in the last sentence of 42 U.S.C. 141 is construed as mandatory ("shall") or as something less.

The absolute prohibition against a housing authority tenant being a commissioner which has been decreed by the court below goes beyond a rational accomplishment of the purpose stated by that court, viz. to prohibit a conflict of interest. It is clear that that court has gone too far in centering exclusively on a limited matter at the expense of the constitutional rights of all the petitioners. Other states, through their attorney generals' opinions, have not found it necessary to completely exclude tenants from being commissioners in order to prevent conflict of interest.

IV

Denial of the petition will open the way to compelling surrender of constitutional rights as condition of receiving benefits of United States Housing Act of 1937.

In this case the petitioners assert that a state court has, in effect, put restrictions in an unconstitutional way, upon the rights and privileges which Congress has granted to

tenants of Federally subsidized local housing authorities (and to such authorities). This Court ought to accept jurisdiction in order to determine whether this situation comes within the general principles that the Government may not compel the surrender of a constitutional right as a condition of granting governmental favor.

It is important for persons who are public housing tenants and for those persons who may be considering whether to become public housing tenants and thereby receive governmental assistance under the Housing Act of 1937, as amended, to know whether rights and privileges must be surrendered in order to receive such benefits. If a tenant (and each member of his family) must give up the right to participate in his own self governance as a commissioner of the housing authority where he lives, he should have the right to know this. If that right or privilege cannot be taken away from a tenant simply and solely because he is a tenant, he should have the right to know that, too. Acceptance by this Court of jurisdiction over this case will enable such a person to know his rights and his disabilities and then conduct himself accordingly. There are large numbers of persons in the nation who are involved or potentially involved in this situation and to whom a decision by this Court in this case is important.

It is too high a price to charge, for the Federal government or any state government to demand that a tenant shall be required to surrender his right to be eligible for the office of housing authority commissioner, in order to receive benefits under the Housing Act of 1937, as amended.

> "The most clearly defined problem posed by government largess is the way it can be used to apply pressure against the exercise of constitutional rights. A first principle should be that government must have no power to 'buy up' rights guaranteed by the Constitution. . .

> "This principle is in a sense a revival of the old but neglected rule against unconstitutional conditions, as enunciated by the Supreme Court:
>
> > 'Broadly stated, the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal constitution.' [Citing *United States* v. *Chicago*, M., St. P. & P.R.R., 282 U.S. 311, 328-29]"

Reich, *The New Property*, 73 Yale L. J. 733, 779-780 (1964); see also *Thorpe* v. *Housing Authority of Durham*, 386 U.S. 670, 678-679 (1967).

Professor Reich also points out (73 Yale L. J. at pp. 785-786):

> ". . . The aim of [recent statutory public benefits] is to preserve the self-sufficiency of the individual . . . and to allow him to be a valuable member of a family and a community; in theory they represent part of the individual's rightful share in the commonwealth . . ."

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DONALD E. COBEY,
CHARLES W. DIBBELL,
RONALD J. FRACASSE
205 Church Street
New Haven, Connecticut 06506
Counsel for Petitioners

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